

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3 MICHAEL DEAN ADKISSON,

Case No.: 2:14-cv-01934-APG-CWH

4 Petitioner

ORDER

5 v.

6 D.W. NEVEN, et al.,

7 Respondents

8
9 Petitioner Michael Dean Adkisson moves for an order staying the decision in this case so
10 his counsel can evaluate Adkisson's pending state court proceedings. ECF No. 77. The
11 respondents oppose. ECF No. 78. I will grant the motion.

12 In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the
13 discretion of the court to facilitate a habeas petitioner's return to state court to exhaust claims.

14 The Court stated:

15 [S]tay and abeyance should be available only in limited circumstances.
16 Because granting a stay effectively excuses a petitioner's failure to present his
17 claims first to the state courts, stay and abeyance is only appropriate when the
18 district court determines there was good cause for the petitioner's failure to
19 exhaust his claims first in state court. Moreover, even if a petitioner had good
20 cause for that failure, the district court would abuse its discretion if it were to
21 grant him a stay when his unexhausted claims are plainly meritless. Cf. 28 U.S.C.
22 § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the
23 merits, notwithstanding the failure of the applicant to exhaust the remedies
available in the courts of the State").

21 *Rhines*, 544 U.S. at 277. The Court went on to state that, "[I]t likely would be an abuse of
22 discretion for a district court to deny a stay and to dismiss a mixed petition if the petitioner had
23 good cause for his failure to exhaust, his unexhausted claims are potentially meritorious, and

1 there is no indication that the petitioner engaged in intentionally dilatory litigation tactics.” *Id.* at
2 278. The Ninth Circuit has held that the application of an “extraordinary circumstances”
3 standard does not comport with the “good cause” standard prescribed by *Rhines*. *Jackson v. Roe*,
4 425 F.3d 654, 661-62 (9th Cir. 2005). The court may stay a petition containing both exhausted
5 and unexhausted claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims
6 are potentially meritorious; and (3) the petitioner has not engaged in dilatory litigation tactics.
7 *Rhines*, 544 U.S. at 277; *see also Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir. 2008).

8 The Federal Public Defender represents Adkisson in this action. Counsel bases this
9 motion to a large degree on *Rhines*. However, the respondents have already answered the
10 petition (ECF No. 49), and Adkisson asks that I defer an adjudication of the merits of the petition
11 pending recent proceedings in state court. ECF No. 77. Adkisson does not elaborate on the issue
12 that he is pursuing in state court, but states that it is a hybrid claim involving both the Nevada
13 Department of Corrections’ implementation of his sentence and the underlying statutory
14 legality. He asks that I briefly defer a merits decision because as the state-court proceedings
15 unfold he will have a better idea whether he has a basis to request a stay and abeyance under
16 *Rhines*.


17 I will grant the motion and briefly defer a decision on the merits of the federal habeas
18 petition. Adkisson shall file a status report within 60 days that explains the status of the state-
19 court proceedings and whether he intends to file a motion for stay and abeyance of this action.

20 IT IS THEREFORE ORDERED that Adkisson’s motion to defer a merits decision on this
21 federal habeas petition (**ECF No. 77**) is **GRANTED**.

1 IT IS FURTHER ORDERED that within 60 days of the date of this order Adkisson shall
2 file a status report regarding his state-court proceedings and whether he will seek a stay in this
3 case.

4 IT IS FURTHER ORDERED that Adkisson's third motion for extension of time to file
5 supplemental authorities (**ECF No. 73**) is **GRANTED** *nunc pro tunc*.

6 Dated: February 8, 2019



8 Andrew P. Gordon
9 U.S. District Judge
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